ORIGINAL

NO. 97-9361

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1997

LOUIS JONES, JR.,
Petitioner,

VERSUS

UNITED STATES OF AMERICA,
Respondent.

PETITIONER'S REPLY TO BRIEF OF UNITED STATES IN OPPOSITION
(Capital Case)

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CAPITAL CASE

QUESTIONS PRESENTED

I. **Was Petitioner's death sentence imposed in violation of due process and the Eighth Amendment to the Constitution, where the District Court refused to instruct the jury that the result of nonunanimity in the sentencing phase would be the imposition of a sentence of life without release or parole?**

II. **Is reversal of Petitioner's death sentence required because a reasonable jury could have erroneously interpreted the jury instructions and verdict forms in this case as stating that failure of the jury unanimously to recommend death or life without release would result in a "lesser sentence" for Petitioner (when, in fact, no lesser sentence was actually available)?**

III. **Is reversal of Petitioner's death sentence required where the jury relied upon unconstitutionally vague, overbroad, and duplicative aggravating factors, and the Court of Appeals summarily asserted that these constitutional errors were harmless without explaining how it reached that conclusion?**

IV. **Does the Fifth Circuit's opinion in this case comply with the requirements of 18 U.S.C. § 3595?**

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Now comes petitioner Louis Jones, Jr. and, pursuant to Supreme Court Rule 15.6, hereby files the following Reply to the Brief of the United States in Opposition to Petitioner's Petition for Writ of Certiorari.

I. Was Petitioner's death sentence imposed in violation of due process and the Eighth Amendment to the Constitution, where the District Court refused to instruct the jury that the result of nonunanimity in the sentencing phase would be the imposition of a sentence of life without release or parole?

The detail in which the government has felt obligated to respond to Petitioner's arguments on the merits belies the government's claims that the questions presented by this case are not worthy of this Court's consideration. This is especially true of the first question presented, which presents, among other issues, the extremely important issue whether, under the Federal Death Penalty Act of 1994 ("FDPA"), a second sentencing hearing is permitted following jury deadlock on the appropriate sentencing verdict.

The government's argumen s in favor of permitting a second sentencing hearing after jury deadlock are without merit. First, relying on 18 U.S.C. § 3593(e), which provides that the jury's "recommendation" on sentencing m ust be unanimous[1], the government claims that "there can be no jury sentencing decision without unanimous agreement." Resp. Br. 9. But § 3593(e) is not in the least inconsistent with Petitioner's argument, which is that, under 18 U.S.C. §3594, jury deadlock or nonunanimity results in a default sentencing by the **judge**. Section 3593(e) states only that, in order for the jury to issue a binding recommendation on sentence, that recommendation must be

[1] Section 3593(e) provides in relevant part that "the jury by unanimous vote . . . shall recommend whether the defendant should be sentenced to death, to life imprisonment without possibility of release or some other lesser sentence."

unanimous. However, § 3593(e) is utterly silent on the consequences of failure to achieve unanimity, and thus provides no support for the government's arguments.

The government next claims that a second sentencing hearing following jury deadlock is implicitly authorized by 18 U.S.C. § 3593(b)(2)(C), which allows a hearing to be conducted before a jury other than the jury that determined the defendant's guilt if "the jury that determined the defendant's guilt was discharged for good cause." Resp. Br. 10. While admitting that "the statute[] fail[s] to authorize in express language a resentencing following a hung jury," the government argues that, nevertheless, such a resentencing should be implied from the statute on the basis of "the rule that the government is entitled to retry a case to a new jury if the first jury is discharged based on its ability to reach a verdict." Ibid.

This argument is flawed in several respects. First, as discussed below, § 3594 provides a compelling argument that jury deadlock results in a default sentencing by the judge. At the very least, the rule of lenity would require that the FDPA **not** be construed so as to permit the government numerous opportunities to try to put a defendant to death. This is particularly so in light of a line of this Court's cases which the government does not discuss. In Bullington v. Missouri, 451 U.S. 430, 446 (1981), this Court found that the Double Jeopardy Clause barred imposition of a death sentence after reversal of a previous prosecution in which the defendant had been sentenced to life imprisonment. This Court noted "the embarrassment, expense and ordeal," as well as the "anxiety and insecurity," occasioned by multiple attempts to seek the death penalty. Id. at 445 (internal quotation marks and citations omitted). The Court then noted that "[t]he unacceptably high risk that the prosecution, with its superior resources, would wear down a defendant, thereby leading to an erroneously imposed death sentence, would exist if the State were to have a further opportunity to convince a jury to impose the ultimate punishment." Id. at 445-46 (internal quotation marks and

citations omitted). See also Monge v. California, ___ U.S. ___, 118 S.Ct. 2246 (1998) (reaffirming Bullington in capital sentencing context, and reiterating concerns raised in Bullington).

These considerations -- the ordeal and anxiety of being placed on trial for one's life, plus the repugnance of the spectacle of allowing the government to have multiple shots at trying to persuade a jury to impose a sentence of death -- counsel toward interpreting the FDPA as Petitioner suggests. Under this interpretation, which is supported by the language of § 3594 and the policies underlying Bullington and its progeny, the government has one chance to persuade the jury unanimously to select death. If the government fails to do so, it is the government, and not the defendant, who bears the brunt of this failure.

Last, but certainly not least, the government attempts to discount the significance of 18 U.S.C. § 3594, which provides that a unanimous jury recommendation for death or life without release must be imposed by the judge; "[o]therwise, the court shall impose any lesser sentence that is authorized by law." The government claims that this latter sentence extends only to the possibility of a unanimous jury recommendation of a lesser sentence. Resp. Br. 11. But the government's interpretation does violence to the plain meaning of the word "otherwise." The plain meaning of the word "otherwise" is "**in every other case besides those specifically enumerated**." The government has shown no reason that would justify overriding the plain meaning of the word "otherwise."

If Congress had intended for the statute to read as the government argues, Congress could easily have made the second sentence to read parallel with the first sentence, as follows:

> ~~Otherwise,~~ *Upon a recommendation under section 3593(e) that the defendant should be sentenced to some other lesser sentence,* the court shall impose any lesser sentence that is authorized by law.

(Strikeouts indicate deletions; italics indicate proposed amendments.) But Congress did not do so, and that failure is telling.

While Petitioner does not purport, in the limited space available here, to give an exhaustive defense of his position on the merits, he has at least made a substantial showing of support for his position. And, "[e]ven if the [Court] does not consider the issue to be as clear as [Petitioner] do[es], [it] must at least acknowledge . . . that it is eminently debatable -- and that is enough, under the rule of lenity, to require finding for the petitioner here." Smith v. United States, 508 U.S. 223, 246 (1993) (Scalia, J., dissenting). Thus, it is clear that this question presents a substantial and important subsidiary statutory question concerning capital prosecution under the FDPA, which this Court, in its role as superintendent of the lower federal courts, should examine in this capital case.

The constitutional question presented (if Petitioner's statutory interpretation is accepted) is also significant, namely: whether the Constitution requires that capital sentencing juries be instructed as to the effect of nonunanimity as to the sentencing verdict. The government does not even attempt to deny that there is a split of authority as among the state courts of last resort and the few federal courts to have considered this question. See Resp. Br. 14 & fn.3. This split of authority on this important constitutional question justifies this Court's certiorari review as well. See SUP. CT. R. 10(a), (b). This is particularly so, in light of the Eighth Amendment requirement of reliability in capital sentencing proceedings, and this Court's concomitant insistence that the jury be given **accurate** information about its role in capital sentencing. See discussion at Pet. 24-25. Accordingly, this Court should grant certiorari to consider the first question presented.

II. Is reversal of Petitioner's death sentence required because a reasonable jury could have erroneously interpreted the jury instructions and verdict forms in this case as stating that failure of the jury unanimously to recommend death or life without release would result in a "lesser sentence" for Petitioner (when, in fact, no lesser sentence was actually available)?

In a transparent attempt to stave off this Court's review, the government disparages this claim as "fact-bound," Resp. Br. 15, and "fact-specific," Resp. Br. 16.[2] However, this Court has never hesitated to grant review in cases requiring detailed examination of particular jury instructions and verdict forms where -- as here -- an important constitutional question is implicated. See, e.g., Cage v. Louisiana, 498 U.S. 39 (1990) (per curiam); Mills v. Maryland, 486 U.S. 367 (1988).

At issue here is such an important constitutional question, namely: whether the Eighth Amendment right to reliable death sentences, not arbitrarily or capriciously imposed, is violated where the capital sentencing jury is erroneously led to fear that, unless the death sentence is imposed, the defendant may receive a less-than-life sentence, resulting in defendant's ultimately being released from confinement. Several Members of this Court have noted the serious Eighth Amendment problems arising from the failure to apprise jurors of the fact that, even if they do not vote for a death sentence, the defendant is unlikely ever to be released from prison. See Simmons

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[2] This is patently an attempt to invoke the admonition in the last sentence of Supreme Court Rule 10 that "[a] petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." As will be demonstrated, this is not such a claim.

However, even if this claim were one within the compass of the last sentence of Rule 10, that would not be the end of the story. As Justice Stevens has noted, "Our duty to administer justice occasionally requires busy judges to engage in a detailed review of the particular facts of a case, even though our labors may not provide posterity with a newly minted rule of law. The current popularity of capital punishment makes this 'generalizable principle' especially important. I wish such review were unnecessary, but I cannot agree that our position in the judicial hierarchy makes it inappropriate." Kyles v. Whitley, ___ U.S. ___, 115 S.Ct. 1555, 1576 (1995) (Stevens, J., concurring, joined by Ginsburg and Breyer, JJ.).

v. South Carolina, 512 U.S. 154, 172-74 (1994) (Souter, J., concurring, joined by Stevens, J.) (would hold that Eighth Amendment requires capital sentencing juries to be told that a defendant is ineligible for parole); see also Brown v. Texas, ___ U.S. ___, 118 S.Ct. 355, 355-57 (1997) (opinion of Stevens, J., respecting denial of writ of certiorari, joined by Souter, Ginsburg, and Breyer, JJ.) (noting potential constitutional problems of Texas law prohibiting judges from letting capital sentencing juries know when the defendant will become eligible for parole if not sentenced to death).

The problem is exacerbated where -- as here -- there is not simply a withholding of the fact of parole ineligibility, but rather there is **affirmative misinformation** that failure to vote for death may result in a less-than-life sentence which is in actuality completely unavailable. Courts have, on more than one occasion, found an Eighth Amendment violation where a capital sentencing jury was inaccurately led to believe that there was a realistic possibility that a defendant might ultimately be released from confinement if not sentenced to death. See, e.g., Gallego v. McDaniel, 124 F.3d 1065, 1074-76 (9th Cir. 1997), cert. denied, ___ U.S. ___, 118 S.Ct. 2299 (1998); Hamilton v. Vasquez, 17 F.3d 1149, 1159-64 (9th Cir. 1994). The issue raised by this case dovetails with this Court's repeated insistence on the need for **accurate** information in capital sentencing proceedings. See discussion at Pet. 24.

Thus, this case presents an important constitutional question which several Members of this Court have intimated that this Court should answer. And, contrary to the government's representations, Resp. Br. 15-17, this case raises at least a reasonable likelihood that the jury in this case misinterpreted the jury instructions in this case so as to raise this constitutional question.[3]

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[3] Petitioner vigorously disputes the government's contention, Resp. Br. 15, that the "plain error" standard is applicable here. This claim was sufficiently raised in the District Court. However, even if the plain error standard did apply, the error here justifies correction even under this standard.

Indeed, there is more than a reasonable likelihood; there is **absolute certainty**, based upon the affidavits executed by jurors Christie Beauregard and Cassandra Hastings.[4] These affidavits conclusively demonstrate that the jury was confused and misled by the jury instructions and verdict forms in precisely the manner urged by Petitioner: that is, the jury erroneously believed that, if they could not unanimously agree on death or life without release, it would default to the judge to impose some other "lesser sentence."

In addition to the Eighth Amendment question presented, this case also implicates the due process guarantee under this Court's decision in Hicks v. Oklahoma, 447 U.S. 343 (1980). The government, however, claims that Hicks is distinguishable, because, in this case, the jury's sentencing options were improperly expanded, not constricted as in Hicks. The government then claims that "[h]ere, in contrast to Hicks, petitioner cannot show any harm from the submission of an extra sentencing option that the jury chose not to recommend." Resp. Br. 18.

[4] Contrary to the government's representation, Resp. Br. 17, Petitioner **does** challenge the Fifth Circuit's ruling that these affidavits may not be considered. Indeed, this is a "subsidiary question fairly included" within this question, which this Court may also consider. See SUP. CT. R. 14.1(a).

The Fifth Circuit's refusal to consider these affidavits was erroneous for a number of reasons. First, that court's reliance on Federal Rule of Evidence 606(b) was misplaced, since the Federal Rules of Evidence do not, by their own terms, apply to sentencings. See FED. R. EVID. 1101(d)(3); see also 18 U.S.C. § 3593(c) (rules of evidence do not apply to presentation of evidence during the separate sentencing hearing in a capital case). Moreover, because the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed," Lockett v. Ohio, 438 U.S. 586, 604 (1978), courts should be especially reluctant to utilize rules of evidence in a way that circumscribes the evaluation of the reliability of the process by which the death penalty was imposed. Cf. Green v. Georgia, 442 U.S. 95, 97 (1979) (per curiam) (reversing death sentence and remanding where "mechanistic" application of Georgia evidentiary rule on hearsay deprived petitioner of a fair trial on the issue of punishment). Finally, in a very similar capital sentencing instruction claim, this Court has expressed its apparent willingness to consider extrinsic evidence in determining whether there is a reasonable probability that a jury misinterpreted its instructions. See Mills v. Maryland, 486 U.S. at 381-83.

This reasoning is specious. The harm is in the reasonable likelihood -- and, indeed, the **reality**[5] -- that the jury in this case did "compromise" on a sentence of death in preference to the less-than-life sentence they (erroneously) believed would result from deadlock. As such, this case fits comfortably within the holding of Hicks that, where a jury is charged with a discretionary sentencing decision, it should be fully aware of the extent of that discretion, by being properly apprised of all its sentencing options.

Even assuming arguendo that the plain error standard of review applies, here there was plain error: the error here was clear and obvious, it affected Petitioner's substantial rights, and to leave it uncorrected would affect the public reputation and integrity of these serious capital proceedings.[6] Therefore, this Court should also grant certiorari to consider the second question presented, and all the important and recurring issues included therein.

[5] As demonstrated by the affidavits of jurors Christie Beauregard and Cassandra Hastings.

[6] If the plain error standard is to apply at all in death penalty proceedings, it should be applied much less stringently in light of the Eighth Amendment requirement of reliability in capital proceedings -- an important guarantor of which is appellate review. Indeed, this Court should grant certiorari in this case, if for no other reason, to clarify the relationship between the plain error rule of Federal Rule of Criminal Procedure 52(b) (and other plain error rules) and the reliability requirement of the Eighth Amendment.

III. Is reversal of Petitioner's death sentence required where the jury relied upon unconstitutionally vague, overbroad, and duplicative aggravating factors, and the Court of Appeals summarily asserted that these constitutional errors were harmless without explaining how it reached that conclusion?

The government concedes that the District Court submitted two invalid nonstatutory aggravating factors to the jury that sentenced Petitioner to death. The two nonstatutory aggravating factors were unconstitutionally vague, overbroad, and duplicative of each other. Nonetheless, the government insists that the death sentence must stand because the Fifth Circuit "properly applied harmless error analysis under this Court's precedents and the governing statute." Resp. Br. 18.

Notably, however, the government does not -- indeed it cannot -- point to any **analysis** or **explanation** by the Court of Appeals indicating how it reached the conclusion that the constitutional error was harmless beyond a reasonable doubt. The Court of Appeals baldly asserted a **conclusion** that the sentence would have been the same had the invalid aggravating factors never been submitted to the jury. Such a bald assertion is plainly insufficient. The Eighth Amendment requires "a detailed explanation based on the record" to support a finding of harmless error. Clemons v. Mississippi, 494 U.S. 738, 753 (1990). Although this Court has never precisely delineated "the degree of clarity with which [an] appellate court must reweigh in order to cure an otherwise invalid death sentence," Richmond v. Lewis, 506 U.S. 40, 48 (1992), this Court has made clear that cryptic conclusions and bare assertions will not suffice. Indeed, this Court should grant certiorari to make explicit what has been implicit in many previous holdings: "[A] bald assertion that an error of constitutional dimensions was 'harmless' cannot substitute for a principled explanation of how the court reached that conclusion." Sochor v. Florida, 504 U.S. 527, 541 (1992) (O'Connor, J., concurring).

The government states that "the court of appeals set forth its harmless error methodology in detail." Resp. Br. 20. The government's use of the word "methodology" is significant. It is true that

the opinion of the Court of Appeals spends four paragraphs discussing this Court's precedents on harmless error in cases in which an unconstitutional aggravating factor has infected the sentencing process -- in particular, Clemons and Stringer v. Black, 503 U.S. 222 (1992). But most significantly, the court's **application** of that "methodology" consists of only one sentence: "After removing the two nonstatutory aggravating factors from the mix, we conclude that the two remaining statutory aggravating factors unanimously found by the jury support the sentence of death, even after considering the eleven mitigating factors found by one or more jurors." Jones, 132 F.3d at 252.

This is precisely the sort of "cryptic" conclusion of harmless error condemned by this Court in Clemons, 494 U.S. at 753. As this Court has made clear, "when the death sentence has been infected by a vague or otherwise constitutionally invalid aggravating factor, the . . . appellate court . . . must actually perform a new sentencing calculus, if the sentence is to stand." Richmond v. Lewis, 506 U.S. 40, 49 (1992). Once the jury's sentence was found to be unconstitutional, the Court of Appeals in effect became the sentencer in this case. Petitioner has a right under the Eighth Amendment to an individualized determination of his sentence. The sentencer must consider all mitigating evidence, and, under this statute, weigh the mitigating factors against the valid aggravating factors. The "new sentencing calculus" required in this case, therefore, must include, at a minimum, a discussion of the mitigating evidence and how heavily it weighs in the balance against the valid aggravating factors.

Contrary to the government's assertion, the Court of Appeals, in the portion of its opinion purporting to apply harmless error analysis, did not discuss any of the mitigating evidence, nor did it even list the eleven mitigating factors found by at least one of the jurors. And as detailed in Petitioner's petition, that mitigating evidence was substantial. See Pet. 32-33. In Clemons, this Court noted that "the Mississippi Supreme Court's opinion is virtually silent with respect to the particulars of the allegedly mitigating evidence presented by Clemons to the jury." Clemons, 494

U.S. at 752. The only difference is that the Fifth Circuit's opinion here is **completely silent** with respect to the particulars of the mitigating evidence.

Clemons is therefore squarely on point. The government's assertion that this case "bears no resemblance to Clemons" (Resp. Br. 20) is remarkable for its inaccuracy. Not surprisingly, the government offers no explanation as to how Clemons is distinguishable.

The Fifth Circuit's blatant misapplication of this Court's precedents is especially significant here because this is the first case in the nation tried and appealed under the Federal Death Penalty Act of 1994. Accordingly, the Fifth Circuit's erroneous opinion takes on added importance. As superintendent of the lower federal courts, this Court should grant certiorari and correct this error. Moreover, the opinion has significance far beyond the FDPA. Many states employ weighing capital punishment schemes similar to that of the federal statute. Up until now, the law on harmless error under such statutes has been clear. If allowed to stand, the Fifth Circuit's blatant disregard of the law could sow needless confusion for many state courts administering similar statutes, as well as for federal courts in habeas corpus review of death sentences in weighing states.

For all the foregoing reasons, this Court should grant certiorari to consider the third question presented.

IV. Does the Fifth Circuit's opinion in this case comply with the requirements of 18 U.S.C. § 3595?

The government claims that the Fifth Circuit "addressed" all of the issues raised by Petitioner on appeal, within the meaning of § 3595(c)(1), when that court summarily stated (1) that it had considered all of Petitioner's issues (without even specifying what fourteen of the eighteen issues were) and (2) that it affirmed Petitioner's convictions and death sentence. See Resp. Br. 22. But the government's stunted view of the term "address" under § 3595(c)(1) would render that provision entirely superfluous, since it adds nothing to what courts of appeals are already required to do -- i.e., to consider and decide all the claims brought before them.[7] Furthermore, the use of the word "consider" within the very same sentence in § 3595(c)(1) suggests that, contrary to the government's argument, "address" must mean something more than simply to "consider."

The government also fails to account for the requirement, in § 3593(c)(3), that the court of appeals "shall state in writing the reasons for its disposition of an appeal of a sentence of death under this section." Remarkably, the government concludes that this requirement was satisfied by this statement by the Court of Appeals: "the sentencing provisions of the Federal Death Penalty Act are constitutional, and [ ] petitioner's death sentence was not imposed under the influence of passion, prejudice, or any other arbitrary factor." See Resp. Br. 22-23 (quoting United States v. Jones, 132 F.3d 232, 253 (5th Cir. 1998)). But these are not **reasons** -- these are **conclusions**. Furthermore, these conclusions address only a small portion of the issues raised by Petitioner and the otherwise mandated appellate review. They do not even begin to address the other "substantive and procedural issues," see § 3595(c)(1), raised by Petitioner.

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[7] The government does not suggest that, in noncapital cases not governed by § 3595(c)(1), the courts of appeals are free to pick and choose which issues they are going to decide.

The only way to make sense of the requirements of § 3595 is to read these as Petitioner does, namely: that the courts of appeals are required to discuss "each substantive and procedural issue" raised by a death-sentenced individual and to explain -- even if only briefly -- the reasons for their disposition of each issue.[8] The government's interpretation, taken to its logical extreme, would permit a court of appeals to discharge its responsibilities under § 3595(c)(1) and (3) by issuing a one-sentence opinion: "We have considered all of the issues raised by defendant, and we affirm." Surely Congress had something more in mind than this empty formality when it passed § 3595(c)(1) and (3).

The government also argues that any error is harmless because "[e]ach of the claims petitioner raises in this Court, however, was discussed and resolved in writing by the court of appeals. The only claims that petitioner argues were not disposed of by 'full opinion' are claims that he has chosen not to renew here." Resp. Br. 23. The government overlooks the fact that a written opinion on **all** of the issues raised by Petitioner in his appeal could have caused Petitioner drastically to alter the focus of his cert. petition. It is difficult or impossible to divine "cert.-worthy" error where the lower court's reasoning does not appear.

Furthermore, it is questionable whether harmless error analysis should even apply because of the important institutional and systemic interests served by the opinion requirements of § 3595(c)(1) and (3). Requiring a court of appeals to articulate its reasons for disposing of all of a death-sentenced individual's claims has value to society at large, to assure the public that there has been the searching appellate review necessary to ensure that the death penalty is not arbitrarily and capriciously imposed.

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[8] Even if Petitioner's interpretation were not the most compelling both textually and as a matter of policy, however, it cannot be gainsaid that it is at least plausible; and therefore that interpretation is also required by application of the rule of lenity.

Because of the importance of appellate review to assure the constitutionality of death penalty schemes, this Court should grant certiorari to consider the requirements of § 3595(c)(1) and (3). In this regard, it should be noted that, unlike death penalty cases arising out of state courts, in which cases both state and federal review is available, here Petitioner will have his case reviewed by only one set of courts (the federal courts).

Moreover, because this case is on petition for certiorari from a direct appeal in federal court, this Court has a special responsibility to ensure that justice is done. Thus, it is peculiarly appropriate for this Court to grant certiorari on this issue in the Court's role as the supervisor of the lower federal courts. Accordingly, Petitioner prays that this Court grant certiorari to consider this question.

CONCLUSION

For the reasons set forth above, and for the reasons set forth in petitioner's original Petition for Writ of Certiorari, this Court should grant certiorari to review the judgment and opinion of the Fifth Circuit in this matter.

Respectfully submitted,

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